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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WELTON J. SCOTT
Engineman Fireman Apprentice, U.S. Navy,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

WHETHER MERE PRESENCE IN THE COMPANY OF THE VICTIM AND THE PERSON LAWFULLY APPREHENDED FOR HIS MURDER, NEARLY AN HOUR BEFORE THE ESTIMATED TIME OF DEATH, CONSTITUTES PROBABLE CAUSE TO APPREHEND?

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Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Welton J. Scott, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 22 M.J. 297 (App. 2a). The final order of the Court of Military Appeals denying a petition for reconsideration is reported at ___ M.J. ___ (October 29, 1986) (App. 1a). The first opinion of the Navy-Marine Corps Court of Military Review is reported at 13 M.J. 874 (App. 28a). The order of the Court of Military Appeals reversing the Court of Military

Review and returning the case to that court for further consideration is reported at 16 M.J. 449 (App. 27a). The second and final opinion of the Navy-Marine Corps Court of Military Review is reported at 17 M.J. 724 (App. 18a).

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on August 18, 1986, affirming petitioner's conviction of October 30, 1980. The petition for reconsideration was denied on October 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259 (3).

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States provides:

> Amendment IV: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTORY PROVISION INVOLVED

Article 7, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 807, provides:

> Apprehension
>
> (a) Apprehension is the taking of a person into custody.

(b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this chapter or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.

STATEMENT OF THE CASE

Approximately 5:20 a.m., July 19, 1980 the body of Yeoman Gary Smith, U.S. Navy, was found by a roving security guard within the Ship Repair Facility (SRF) at Naval Station, Guam. Smith had been stabbed to death. Time of death was medically estimated to be between 3:30 and 4:40 a.m. Two pairs of sunglasses were found near his body, one of which was his. His car was found nearby.

Smith was last seen entering the SRF in his car at approximately 2:30 a.m. enroute to the USS KINKAID to drop off three passengers (at least one of whom was black), according to the SRF gate guard. KINKAID, a Navy destroyer, was the only ship in the SRF with crewmembers residing aboard. Access to the SRF was controlled through a manned gate.

Naval Investigative Service (NIS) Agent Simon was assigned to the case. He focused on KINKAID crewmembers, specifically those black crewmembers who were logged in as returning to the ship from shore liberty after 2:15 a.m. Included in that group were petitioner and Seaman Gregory Price who returned together at 3:00. Soon thereafter, Price was seen leaving the ship alone and heading toward the area where Smith's body was found.

By the next day, Simon had ruled out in his own mind all the black crewmembers (within the group

returning after 2:15 a.m.) except Price and petitioner. He then questioned Price. He determined that Price was a suspect based on Price's suspicious answers to questions, his presence near the scene of the crime after 3:00 a.m., and the fact that Price, who always wore sunglasses, had none during the questioning.

Simon suspected petitioner as well. He asked the ship's security force to bring him to his office. They summoned petitioner from shore liberty and escorted him to Simon's office. In fact, the ship's security personnel brought all potential witnesses and suspects to Simon's office at his direction. After advising him of his right to remain silent, Simon questioned petitioner who denied involvement. A subsequent consensual search of petitioner's ship locker revealed blood stained pants. Confronted with this evidence, petitioner confessed to the murder of Smith. In separate courts-martial, he and Price were each convicted of premeditated murder and sentenced to life imprisonment.

At trial, petitioner moved to suppress the introduction of his confession and the bloody pants into evidence as the poisonous fruit of an unlawful apprehension. The trial judge found that no probable cause to apprehend petitioner existed but that his escorted appearance before Agent Simon was not an apprehension that required probable cause. He denied the motion and the evidence was admitted. On appeal, in its first opinion (App. 28a), the Navy-Marine Corps Court of Military Review opined that this Court's decision in *Dunaway v. New York*, 442 U.S. 200 (1979) was not applicable to the military setting and held that seizing petitioner for questioning did not require probable cause.

The Court of Military Appeals returned the case to the Court of Military Review for reconsideration of that holding. In its second opinion (App. 18a), the Court of Military Review found that, although *Dunaway* is applicable to the military setting, petitioner was not seized within the meaning of *Dunaway*. Moreover, the court found that probable cause to apprehend him did exist. The Court of Military Appeals granted review of this *Dunaway* issue. The court held that petitioner was seized and held for custodial interrogation within the meaning of *Dunaway*, requiring probable cause. The court found that Simon had probable cause to believe petitioner committed the offense based primarily on his presence with the principle suspect, Price, near in time to the murder and the fact that, of the group of black KINKAID crewmembers returning to the ship, petitioner was one of only two (the other being Price) whose whereabouts at the time had not yet been accounted for (App. 16a).

REASONS FOR GRANTING THE WRIT

THE COURT OF MILITARY APPEALS' FINDING OF PROBABLE CAUSE TO APPREHEND IS BASED ON THE CONCEPT OF GUILT BY ASSOCIATION AND IS THEREFORE IN DIRECT CONFLICT WITH SUPREME COURT PRECEDENT.

Authority to apprehend servicemembers and to hold them in custody comes directly from Article 7, UCMJ, 10 U.S.C. § 807, set forth, *supra*. That article precludes apprehension unless there exists a reasonable belief that the person to be apprehended committed or is committing an offense. The article also defines apprehension as the taking of a person into custody.

It has long been settled in military law that apprehension upon reasonable belief under Article 7 is nothing more nor less than a warrantless arrest upon probable cause under the fourth amendment of the U.S. Constitution. *United States v. Ross,* 13 U.S.C.M.A. 432, 32 C.M.R. 432 (1963).

Indeed, on the subject of apprehensions under Article 7, the Court of Military Appeals and the service courts of military review have always been bound by the fourth amendment and this Court's decisions interpreting it. *United States v. Mitchell,* 12 M.J. 265 (C.M.A. 1982); *United States v. Acosta,* 11 M.J. 307 (C.M.A. 1981). In this very case, *Dunaway* was the basis of the lower court's holding that the seizure of petitioner for the purpose of interrogation was a custodial arrest, regardless of the technical name attached to it, and thus subject to the fourth amendment's probable cause requirement. *See also United States v. Schneider,* 14 M.J. 189 (C.M.A. 1982) (where the Court of Military Appeals first applied *Dunaway* to military apprehensions). Similarly, the Court of Military Appeals has looked to Supreme Court decisions to define and analyze the very nature of probable cause. *See United States v. Tipton,* 16 M.J. 283 (C.M.A. 1983) (discussion of probable cause under *Illinois v. Gates,* 462 U.S. 213 (1983)); *Schneider,* 14 M.J. at 194 (quoting *Brinegar v. United States,* 338 U.S. 160, 175-76 (1949) in a discussion of probable cause).

The Court of Military Appeals' consistent application of Supreme Court and lower federal court decisional law (on the subjects of custodial seizures and probable cause) to the military environment for over 30 years makes all the more puzzling its total aban-

donment of that law in finding probable cause in this case. Pared to its essence, the finding of probable cause to apprehend petitioner was nothing more than guilt by association with petitioner's codefendant, Price.

Guilt by mere association or mere presence was rejected as a basis for probable cause to arrest by this Court in *United States v. Di Re,* 332 U.S. 581 (1948), again in *Sibron v. New York,* 392 U.S. 40 (1968), and again in *Ybarra v. Illinois,* 444 U.S. 85 (1979). This fixed point of law has been honored time and time again by the federal courts. *See United States v. Vaughan,* 718 F.2d 332 (9th Cir. 1983); *United States v. Butts,* 704 F.2d 701 (3rd Cir. 1983); *United States v. Fisher,* 702 F.2d 372 (2d Cir. 1983); *United States v. Capers,* 685 F.2d 249 (8th Cir. 1982); *United States v. Bazinet,* 462 F.2d 982 (8th Cir. 1972); *United States v. Kornblau,* 586 F.Supp. 614 (D.C. N.Y. 1984). Likewise, state courts have consistently applied this principle. *Commonwealth v. Hook,* 313 Pa. Super. 1, 459 A.2d 379 (1983); *State v. Hansen* 117 Ariz. 496, 573 P.2d 896 (Ariz. App. 1977); *McDonald v. State,* 53 Ala. App. 394, 300 So.2d 837 (1974); *People v. Martin,* 343 N.Y.S.2d 343, 296 N.E.2d 245 (1973). Finally, the Court of Military Appeals, itself, has applied this principle to military law.[1] *United States v.*

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[1] Basing probable cause upon guilt by association is even less justified in the military environment (and therefore potentially more threatening to innocent servicemen) because servicemen usually don't have as much opportunity as civilians to choose their associates. This is not to say that sailors and soldiers cannot choose their own friends. However, it is generally true that they are thrown together far from home in a communal setting with people they don't know. An innocent serviceman

Escobedo, 11 M.J. 51 (C.M.A. 1981). Yet, inexplicably, the court rejected it in this case.

It is certainly true that a suspect's association, near in time to the crime, with one for whom there is probable cause to arrest is a factor for the arresting officer to consider. However, it is equally clear that the arresting officer must know of additional information beyond the mere fact of association or presence that ties the suspect to the offense. *United States v. Howard,* 758 F.2d 1318 (9th Cir. 1985); *United States v. Clark,* 754 F.2d 789 (9th Cir. 1985); *United States v. Cresta,* 592 F.Supp. 889 (D.C. Me. 1984).

In this case, by the time petitioner was taken into custody, Agent Simon had probable cause to believe Price was the killer. Price returned to the SRF within the suspected time frame. His probable means of return was in Smith's car and he admitted knowing Smith. After coming aboard KINKAID at 3:00 a.m., he was then seen leaving the ship and heading toward the place where Smith's body was found. Time of death was estimated between 3:30 and 4:40 a.m. Sunglasses were found at the crime scene and Price, who habitually wore sunglasses, appeared for questioning the next day not wearing his. Finally, Price's explanation of his whereabouts and activities that night was known by Agent Simon to be false.

Concerning petitioner, Simon knew that he had been in Price's company on liberty that evening and that they returned to the ship together at 3:00 a.m. He

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may be assigned to room with a drug dealer; he may share a cab to town with a thief. In other words, circumstance, rather than personal discrimination, may determine whose company he keeps.

could reasonably conclude from these facts that it was likely that petitioner was one of the other passengers in Smith's car along with Price when it returned to the SRF, over an hour before the earliest time of death estimation. But, that's all he knew. Simon knew absolutely nothing that would link petitioner to the crime itself.[2] Neither the Court of Military Appeals nor the Navy-Marine Corps Court of Military Review could point to any such link.

Nothing at the scene pointed to petitioner. In fact, nothing about the crime pointed to more than one killer. This was not a crime that by its nature required a consort of actors like drug transactions, nor one that appeared to involve multiple perpetrators, like a well coordinated bank robbery. Furthermore, there was no evidence available to Agent Simon that suggested participation by more than one. *Cf. People*

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[2] It is clear from the record that Simon himself did not believe he had probable cause to apprehend petitioner, insisting as he did that he did *not* apprehend him. The following excerpt from the record is revealing:

> Q. Did you consider at that time that you had probable cause to apprehend him?
>
> A. [Simon] At the time that I called him I wanted to talk to him as a suspect. I did not ask for him to be apprehended. I merely requested that he be brought over to our office to be interrogated as we had the rest of the crewmembers . . . .
>
> . . .
>
> Q. First, I'm asking you if you know he was apprehended?
>
> A. As far as I know he was never apprehended. I never apprehended him.

Record at 65, 66.

v. Calderon, 85 Ill. App.3d 1030, 41 Ill. Dec. 342, 407 N.E.2d 840 (1980) (evidence that known suspect and unknown others had shot victim justified arrest of defendant in company with known suspect soon after offense); *Commonwealth v. Brown,* 298 Pa. Super. 11, 444 A.2d 149 (1982) (probable cause to arrest X for robbery committed by four men provided probable cause to arrest three men with X at his house half hour later).

Without question, petitioner's relationship to Price and the likelihood he returned to the SRF in the victim's car made it necessary for Agent Simon to question him. This evidence made petitioner at least a material witness and may have given rise to some suspicion of involvement. It falls far short of probable cause, however.[3] Bringing petitioner and his fellow crewmembers to the agent's office in a custodial setting bears resemblance to the practice, condemned by this Court in *Mallory v. United States,* 354 U.S. 449 (1957), of rounding up all potential suspects and sorting them out through the interrogation process at the police station house.[4] *See also Wong Sun v. United*

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[3] Apprehension was hardly the only course of action available to Agent Simon to question petitioner as a material witness. He could have sought petitioner's consent to come in for questioning; he could have come to his ship and asked to speak to him during the working day; perhaps, he could have briefly detained him in the field for questioning under *Terry v. Ohio,* 392 U.S. 1 (1968). Questioning material witnesses and even potential suspects without arresting or apprehending them is part of everyday life for a police officer.

[4] The opportunity for a law enforcement agent to round up all potential witnesses and suspects and herd them down to the station house is particularly prevalent in the military environ-

States, 371 U.S. 471 (1963) (no probable cause to seize three men with same name when only one of them could be suspect).

In *United States v. Hillison,* 733 F.2d 692 (9th Cir. 1984), the court found that the appellant's observed prolonged association over three days with known drug dealers believed to be dealing during the three days, under circumstances that indicated participation by the appellant, constituted probable cause to arrest him. In determining the significance of the association, the court looked to whether it was contemporaneous with the criminal activity and whether the activity could be carried on without the knowledge of all persons present. *Id.* at 697 (citing W. LaFave, *Search and Seizure,* § 3.6 at 658-61. *See also United States v. Irurzun,* 631 F.2d 60 (5th Cir. 1980) (contemporaneous association plus signs of active participation equaled probable cause).

Here, not only was there no evidence of participation by petitioner, there was information known to Agent Simon that petitioner's association with Price was *not* contemporaneous with Smith's death. After Price and petitioner returned at 3:00 a.m., KINKAID watchstanders observed Price leave the ship *alone* and

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ment where the agent is (as in this case) blessed with the aid of commissioned and non-commissioned officers who can use their own military authority to do the "rounding up." Servicemembers are not likely to resist or even question orders from their superiors. Also, if military superiors, in lieu of the police, direct the member to report or escort him, it may appear less like an apprehension. Yet, in terms of the fourth amendment, they are subjected to no less a custodial environment than civilians who are formally arrested. The potential to circumvent the probable cause requirement in this situation is obvious.

walk in the direction where the body was found shortly before the time of death. This information coupled with the absence of evidence of a second killer would cause a reasonable, prudent police officer to believe only Price committed this crime. Even if Simon did suspect that there was more than one perpetrator, at the most probable time of the crime petitioner was aboard ship and no more suspect than any other KINKAID crewmember.

The Court of Military Appeals also looked to the fact that, at the time petitioner was apprehended, he was one of two black KINKAID crewmembers of whose whereabouts the night before Agent Simon had no accounting. Again, this void in the investigation only generated a need to question petitioner. It contributed nothing to the probable cause formula anymore than would the absence of such an accounting for any black KINKAID crewmember before that crewmember was questioned. In the final analysis, the court below can point to no evidence that suggests petitioner's actual participation in the murder of Smith.[5] Its finding of probable cause is truly based on his relationship with Price, a basis that would be insufficient in every other criminal jurisdiction in the Nation.

Because no probable cause existed, petitioner's apprehension was unlawful. His case should be returned to the Court of Military Appeals to determine whether his confession was the product of the unlawful apprehension.

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[5] The trial judge believed this to be true, because despite the urging of government trial counsel to the contrary, he specifically found that probable cause to apprehend petitioner did not exist. Record at 91.

CONCLUSION

The question presented is not uniquely military. It is a question of basic constitutional law that does not distinguish between civilians and servicemen. The Court of Military Appeals, therefore, is not uniquely qualified to answer it. Yet, that court's answer, a wrong answer in this case, has widespread implications for the two million men and women in uniform. These citizens enjoy the same right as their civilian neighbors to remain free from the custody of law enforcement officials absent a showing of probable cause. By justifying a custodial seizure on the facts of this case, the court has steered away from established constitutional law and has devalued that right for servicemembers. For this reason, the petition for certiorari should be granted.

Respectfully submitted,

DAVID C. LARSON
Captain, Judge Advocate General's Corps (JAGC), U.S. Navy
Appellate Defense Counsel
Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 43967/NA
CMR Dkt. No. 81-1257

UNITED STATES,

Appellee,

v.

WELTON J. SCOTT (462-92-1296),

Appellant.

ORDER DENYING PETITION FOR RECONSIDERATION

On consideration of appellant's petition for reconsideration of the Court's decision, 22 M.J. 297 (C.M.A. 1986), it is by the Court this 29th day of October, 1986

ORDERED:

That said petition is hereby denied.

For the Court,

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court

APPENDIX B

No. 43,967.
NMCM 81-1257.

UNITED STATES,

Appellee,

v.

WELTON J. SCOTT, Engineman Fireman Apprentice U.S. Navy,

Appellant.

U.S. Court of Military Appeals.

Aug. 18, 1986.

Accused, an engineman fireman apprentice in the United States Navy, was convicted by general court-martial of premeditated murder and he appealed. The United States Navy-Marine Corps Court of Military Review, 13 M.J. 874, affirmed. The United States Court of Military Appeals, 16 M.J. 449, reversed. The United States Navy-Marine Corps Court of Military Review, 17 M.J. 724, again affirmed. The United States Court of Military Appeals, Everett, C.J., held that: (1) accused had been apprehended at time of questioning, but (2) there had been probable cause for his apprehension.

Affirmed.

For Appellant: *Captain David C. Larson,* JAGC, USN (argued); *Lieutenant Commander William A. DeCicco,* JAGC, USN.

For Appellee: *Lieutenant Commander John B. Holt,* JAGC, USN (argued); *Captain W. J. Hughes,* JAGC, USN (on brief).

Opinion of the Court

EVERETT, Chief Judge:

Notwithstanding appellant's pleas, a general court-martial convicted him of the premeditated murder of Yeoman Gary Smith, in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918, and sentenced him to a dishonorable discharge, life imprisonment, total forfeitures, and reduction to the lowest enlisted grade. After the convening authority approved the trial results and the Court of Military Review affirmed the findings and sentence, 13 M.J. 874 (1982), this Court reversed that decision and remanded the case for further consideration in light of *United States v. Schneider*, 14 M.J. 189 (C.M.A.1982). 16 M.J. 449 (1983). On remand, the Court of Military Review again affirmed the findings and sentence. 17 M.J. 724 (1983).

On appellant's petition from that decision, this Court granted review of the following issue:

> WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED IN CONCLUDING THAT APPELLANT'S CONFESSION AND OTHER DERIVATIVE EVIDENCE WERE ADMISSIBLE OVER DEFENSE OBJECTION.

More specifically, appellant has asked us to determine the correctness of the decision on remand that he was not apprehended prior to his questioning by an investigative agent (17 M.J. at 726) and that, if he was, the agent had probable cause for the apprehension (*id.* at 727). *See Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *United States v. Schneider, supra.*

I

A rather detailed recitation of the facts concerning the discovery and investigation of the homicide and the interrogation of appellant is a necessary predicate to resolving this appeal.

A

At 2:26 a.m. on the morning of July 19, 1980, Yeoman Smith approached the gate to the Ship Repair Facility (SRF), a secure compound contained within the perimeter of the Naval Station, Guam. At the gate, Smith explained to the guard that he needed to enter in order to take his passengers to their ship, the USS KINKAID, which was making a brief port to the SRF. The guard noted either two or three other men in the car with Smith at least some of whom were black. Also, the guard observed the odor of marihuana coming from the car and that the men in the car appeared to be intoxicated on some substance. After checking Smith's identification and requiring him to sign the entry log, the guard permitted the car to pass.

The guard remained at the gate until 3:45 a.m., when he began a roving patrol of the SRF. Around 5:20 a.m., he discovered Smith's body in the grass at the intersection of Main and D Streets. The body appeared to have several stab wounds in the chest, neck, and back. Subsequently, Smith was pronounced dead at the scene, with time of death medically estimated to have been between 3:30 and 4:40 a.m.

Smith's car was found nearby. In it, agents of the Naval Investigation Service (NIS) discovered a baggie of suspected marihuana, a cocaine spoon, and two pairs of men's sunglasses—one "hanging over the rearview mirror" and the other "in the glove compartment box." On the concrete slab of a nearby building investigators found a third pair of sunglasses, and they discovered a fourth pair and a set of keys "several yards" from the victim's body. "Both pair of glasses . . . found outside . . . the car were in and around areas where blood was present." Later, investigators learned that the pair on the concrete slab had belonged to Smith, but they were unable to identify positively the owner of the pair found near Smith's body.

Because Smith had indicated to the gate guard that his passengers were from the KINKAID and because no other living quarters or messing facilities were available on the SRF, the investigation focused on that ship's crew. Between 2:26 and 3:30, a number of people had returned to the KINKAID from liberty, including a number of black sailors. Interviews revealed that several of the black crewmembers had arrived back at the ship together aboard a liberty bus, from a club on the Naval Station. After this group had arrived, the accused and a fellow crewmember named Gregory Price—neither of whom had been aboard the liberty bus with the others—crossed the quarterdeck of the KINKAID together at 3:00 a.m.

Witness interviews indicated to investigators that, after Price had boarded the KINKAID, he had gone to his locker and returned to the quarterdeck wearing "different" clothes—specifically, "a red tee-shirt worn inside-out." On the quarterdeck, Price had requested a flashlight, saying that he had lost his wallet when he had exited the vehicle in which he had returned to the ship. A witness indicated that he then had seen Price leave the KINKAID with the flashlight and walk past the area of Building 21, which is near the ship, and toward the area of Building 2008, which lies in a line between the ship and the locations where Smith's body and car were found. The witness had lost sight of Price at that point.

Subsequently, NIS Special Agent Simon interviewed Price. Earlier witness interviews had indicated to investigators "that Price was a habitual wearer of sunglasses, that he all of the time wore sunglasses, that during the day, during the night and that we tried through identification to find out what Price's sunglasses may or may not have looked like. Generally speaking the sunglasses found by the fire hydrant [near Smith's body] were similar to ones believed to belonging [sic] to Price." This background made it noteworthy to Simon that Price did not wear sunglasses during the interview. When asked about them,

Price explained that he had lost them in New Guinea two weeks prior to the KINKAID's arrival in Guam.

Price stated that he and the accused had gone to a disco in a nearby town for the evening. When the disco had closed about 2:00 a.m., the two had returned to the SRF in "a taxi." Price said that, because he and the accused were inebriated and it was against ship regulations to board in that condition, the had walked around for a while "in the general area of Building 21" and had "smoked a marihuana cigarette to help clear their head." When they felt sober enough to board the KINKAID, Price said that he and Scott had crossed the quarterdeck and then had "parted company"—Price to his berthing space and, he assumed, Scott to his own. According to Price, when he later departed the ship to search for his wallet, he "never left" the area between the ship and Building 21—this statement, of course, being inconsistent with what another witness had told investigators earlier.

Concerning his relationship with the decedent, Price told Simon that he had met Smith about 10 days earlier at the Naval Station's gymnasium. He and Smith had chatted in Smith's car for about a half-hour about their home, which investigators inferred from Price's comment was on the East Coast. Simon testified that at the time this did not "ring true" to him for they had learned that, while Smith was from "New Jersey, which is obviously on the East Coast," Price was originally from Cleveland, Ohio, and had lived in California for the last couple of years before entering the Navy.

Investigators also learned that Price, the accused, and a shipmate named Maurice Sumler were friends and frequently went on liberty together when the KINKAID was in port. From witness interviews which corroborated each other, investigators were able to account for the activities during the relevant time frame of all the KINKAID's black sailors—including Sumler—except Price and Scott. Indeed,

by reason of the interviews, "all but two people from the Kinkaid had been eliminated in [the investigators'] . . . minds as suspects"—namely, Price and the accused.

Simon testified that, at this point in their investigation, they had identified several falsehoods which Price had related to them. First, Price had said that a couple of crewmembers, including Sumler, had seen him and Smith talking in Smith's car on the day the two had met; Sumler, however, had told investigators that he had not seen the two together. Second, Price had asserted that, on the night of the incident, he and the accused had taken the liberty bus from an on-base club to the International Trade Center in the local town and had walked from there to the disco; but, Simon—on the basis of his personal experience of driving or walking this distance at least a hundred times—knew that it was impossible to have traversed it in the length of time Price stated it had taken. Third, Price claimed that he had never left the area between the ship and Building 21 when looking for his wallet and that he had "found his wallet in the vicinity of Building 21"; but a witness from the ship had seen him walk past Building 21 toward Building 2008, which was located between the ship and the places where Smith's body and car had been found. Fourth, Price had described his taxi driver "as a local, referring to a Guamanian"; however, the only taxi to have entered the gate in the relevant time frame was driven by a person named Yun—a name which, in Simon's experience, was Chinese or Korean and not Guamanian. Simon indicated that, because there are significant differences in the physical appearances of a Guamanian and an Oriental, Price's description of the driver as a "local" was logically inconsistent with the apparent Oriental origin of the only taxi driver to have entered the SRF during the relevant period of time. Moreover, Price was unable to describe the taxi, to relate any conversations with the driver while they were in the taxi, or to tell exactly what was the taxi fare which he had paid. Also, in Simon's

opinion, Price was unable to give any logical explanation how he could have lost his wallet after leaving the taxi.

B

On the basis of his investigation to this point, Simon suspected Scott of involvement in the murder, along with Price, and decided to talk to him. In sending for the accused, Simon followed the procedure which had been coordinated with the commands of the KINKAID and the Naval Station and which had been followed with regard to three other witnesses from the ship after the on-site investigation at the SRF: A shore patrol vehicle and security personnel provided by the station would pick up the requested witness made available by the ship, transport the witness to the NIS office on the station, and return him to the ship.

Simon told no one about his suspicion of Scott. Instead, he simply asked Chief Waters, the assistant station security officer, to have appellant brought to the NIS office. Waters, in turn, told one of the security persons, a shore patrolman named Heim, to bring Scott in for questioning. At the ship Heim learned from Ah Nee, the Duty Master-at-Arms—who apparently was the KINKAID's point of contact in arranging for the witnesses—that appellant was at the beach onboard the station. Heim and Ah Nee then drove there in the shore patrol vehicle and found Scott. Ah Nee summoned him to the vehicle, checked his identification card, and told him that he must go to the NIS office. Appellant entered the vehicle without resistance,and the three drove to the NIS office.

There, Scott was told to have a seat in the waiting room where Price, Sumler, and another witness also were seated. Ah Nee stood by the door. Waters went to another area of the office and told Simon that appellant had ar-

rived.[1] About 10 minutes later Simon entered the waiting room and escorted Scott to an interrogation room.

At the outset, Simon advised Scott of his rights under Article 31, UCMJ, 10 U.S.C. § 831, and of his right to terminate the interview at any time. Nevertheless, appellant never asked for a lawyer or to terminate the questioning; and at all times he readily responded to Simon's questioning. Simon indicated at trial that, if Scott had indicated a desire "to terminate the interview," he would have done so promptly. However, the investigator also indicated that in that event he would not have permitted Scott simply to leave the office. Instead, consistent with his own usual procedure and the arrangements made with the KINKAID's command, Simon would have transported Scott back to the ship. Indeed, Simon indicated that, if necessary, he "would have restrained" appellant for that purpose if he had attempted to leave on his own, even though Scott had been on liberty at the time he was brought to the office for questioning.

At the end of this interview, Simon asked appellant for permission to search his shipboard locker. Scott readily consented. Thereafter, he and Simon left for the KINKAID, along with another NIS agent who drove the vehicle, and with Price and Sumler, who were returning to the ship after their interrogations. At his locker, the accused pointed out the clothing he had worn the night before while on liberty. When Simon examined the denim jeans which appellant had identified, he discovered what appeared to be blood stains. Accordingly, Simon seized the

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[1] Some of the factual basis for the motion is taken from the Notice of Motion to Suppress (App. Ex. VIII), and the Government's Answer to Motion to Suppress (App. Ex. IX) states: "The facts are substantially as indicated in the defense motion, but with several variances." While we accept the uncontended statement of facts therein, it usually would be better practice to rely at trial only on stipulations or sworn testimony to provide the factual basis for resolution of motions regarding admissibility of evidence.

jeans, returned Scott to his ship, and sent the jeans for lab analysis. When later that same evening the analysis confirmed Simon's suspicions, he questioned Scott a second time. On this occasion, appellant admitted his involvement with Price in Smith's murder.

II

In *United States v. Schneider, supra* at 193, we outlined the following approach to cases like this:

> [O]ur examination must begin, not end, with the determination that Article 31/*Tempia* [16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967)] warnings have been properly given. After having crossed the "threshold requirement" of "voluntariness," we must look to the conditions surrounding the taking of the accused's confession to see if they amount to custodial interrogation. *Dunaway v. New York, supra*, 442 U.S. at 217, 99 S.Ct. at 2259. If the accused was in custody in terms of Article 7, we must test for probable cause to justify the apprehension. *Cf. Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). Next, if we conclude that the accused was held in custody without probable cause justifying his apprehension, we must examine "the causal connection between the illegality and the confession." *Brown v. Illinois, supra*, 422 U.S. [590] at 603, 95 S.Ct. [2254] at 2261[, 45 L.Ed.2d 416]. . . . ". . . And the burden of showing admissibility rests, of course, on the prosecution." *Brown v. Illinois, supra*, 422 U.S. at 603-04, 95 S.Ct. at 2261-62, quoted with approval in *Dunaway v. New York, supra*, 442 U.S. at 218, 99 S.Ct. at 2259. Should there be insufficient attenuation between the illegal custody and the confession flowing therefrom, the confession may not be admitted. *Wong Sun v. United States*, 371

U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Dunaway v. New York, supra.*

A

No controversy exists over whether appellant was properly and fully advised of his rights to silence, to the presence of an attorney, and to terminate the interrogation at any time. Neither is there dispute over whether the accused properly understood this advice nor whether he fully waived his rights and voluntarily answered Agent Simon's questions.

B

"[H]aving crossed the 'threshold requirement' of 'voluntariness.' " we must look to the conditions surrounding the initial interview to see if appellant was under apprehension within the meaning of Article 7, UCMJ, 10 U.S.C. § 807.[2] *See United States v. Schneider, supra* at 193. The combination of several factors leads to an affirmative answer.

First, the Duty Master-at-Arms, accompanied by a uniformed shore patrolman in a shore patrol vehicle, ap-

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[2] The precise definition of "apprehension" within the meaning of Article 7 need not concern us. The Supreme Court in *Dunaway v. New York*, 442 U.S. 200, 214, 99 S.Ct. 2248, 2257, 60 L.Ed.2d 824 (1979), made clear that, "whether or not it is technically characterized as an arrest," detention of a person beyond the brief stop-and-frisk situations blessed in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), or beyond the brief investigative stops "usually consum[ing] less than a minute and involv[ing] 'a brief question or two" (442 U.S. at 210-11, 99 S.Ct. at 2255-56), approved in *United States v. Brignoni-Ponce*, 422 (U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), "must be supported by probable cause," whether at the "investigative" or at the "accusatory stage." 442 U.S. at 214, 99 S.Ct. at 2257. As the Court put it, "[C]ustodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." *Id.* at 216, 99 S.Ct. at 2258.

proached appellant while he was on liberty at the beach and informed him that he must go to the NIS office for questioning. The Court of Military Review assumed that this statement was directive, and we see no reason to disregard or reject that assumption.

The court below found solace in concluding that Ah Nee, a "command representative, . . . invoked command, vice law enforcement authority" in so directing the accused. 17 M.J. at 726. However, someone having authority in the chain of command may perform law-enforcement functions, such as apprehension, with the same effect as if performed by a law-enforcement official. *See* Art. 7. Accordingly, the proper concern is not with the source of Ah Nee's authority but rather with the kind of authority he exercised over appellant that afternoon.

In light of Ah Nee's responsibility as Duty Master-at-Arms, appellant's being accompanied by a uniformed security person, their traveling in a marked shore patrol vehicle, and the order for Scott to accompany them to law-enforcement offices for interrogation, we conclude appellant was in custody.

The facts here are unlike those in *United States v. Sanford*, 12 M.J. 170 (C.M.A. 1981), where he ruled that a sergeant had not created a custodial situation by telling the accused that "Lieutenant Young wants to see you." That order was like any other military directive to report to a superior; there were no objective indicia to the accused of a law-enforcement purpose to the order; no one involved was a law-enforcement official or apparently exercising law-enforcement functions; and the order had a valid military purpose—achieving a drug-free unit—apart from any law-enforcement purpose.

Factors mentioned by the court below as indicative that Scott was not under apprehension—such as his not being advised by Ah Nee that he was a suspect, not being handcuffed, and not being frisk-searched—do not prevent our

concluding that, in the environment already described, Scott was not free to decline the order and that the order clearly was given only for a law-enforcement purpose. As the Supreme Court admonished in *Dunaway v. New York, supra* 442 U.S. at 215, 99 S.Ct. at 2258, "form must not be exalted over substance" by seizing on the absence "of the trappings of a technical formal arrest."

Second, Simon suspected appellant of criminal conduct at the time he directed Waters to have Scott brought in for questioning; and the record leaves no doubt that Simon anticipated that, pursuant to his directive, appellant would be promptly produced for that purpose. This circumstance reenforces our view that Scott was within the custody of Ah Nee and Heim and that the reason for the restraint was related to law-enforcement, not to accomplishing a military mission.

Third, when Ah Nee delivered Scott to the NIS office, he remained in the waiting room with appellant and was positioned at the doorway. Although by itself not compelling, this fact further indicates that appellant's freedom of locomotion had been restricted to the limits determined by law-enforcement authorities. *See generally* para. 174 *d* Manual for Courts-Martial, United States, 1969 (Revised edition) ("Custody . . . may be corporeal and forcible or, once there has been a submission to apprehension or a forcible taking into custody, it may consist of control exercised in the presence of the prisoner by official acts or orders.").

Fourth, although appellant was told that he could terminate the interview at any time, he never was advised that he then would be free to leave. If Scott had been so advised, the impact of other factors, such as Ah Nee's sentry-type position at the doorway, possibly would have been lessened; but the absence of such a communication could only heighten the objective implication of these other factors.

Indeed, Simon indicated at trial that appellant would not have been entirely free to leave even if he had asked to do so—that he would have taken whatever steps that were necessary to assure that Scott was escorted back to the KINKAID. Simon explained this restriction as being consistent with the arrangements made with the ship's command and with his own customary procedure of returning a witness to the command from whence he came. However reasonable this procedure might seem under other circumstances, it had a special significance as to appellant—who was not retrieved from his place of duty, but instead, when brought in, had been on liberty at the beach. Unless Simon had some reason to believe that Scott was not properly absent from his ship, no lawful basis existed for restricting appellant's freedom to leave the NIS office for any destination he chose. Because Simon knew that appellant was on liberty and lawfully away from his ship at the time he was picked up, the investigator's intended limitations on Scott's freedom to leave further indicate that the environment was custodial.[3]

All these circumstances—remarkably similar in important respects to those described by the Supreme Court in *Dunaway v. New York, supra* at 212, 99 S.Ct. at 2256—lead us to conclude that Scott was a suspect whose freedom of locomotion had been restricted more than momentarily for a law-enforcement purpose. Whatever label be attached, the reality is that Scott was being subjected to custodial interrogation.

As we recognized in *Schneider*:

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[3] Even though not communicated to Scott, Simon's intent provides a clue as to his own interpretation of the purpose and nature of his interview of appellant. That interpretation was probably reflected on other aspects of his conduct during the interview, as well. Of course, we are not asserting that an interview with a suspect is transformed into an apprehension merely because at some point the investigator believes that he has probable cause to apprehend and had made up his mind that he will do so.

> "There are numerous situations in the military context where a military person is required to provide information to military authorities without consideration of the existence of probable cause to detain. [Citations omitted.] This may occur on the street, in offices, and in hearing rooms, as well as in places specifically provided for interrogation. And the obligation to report to such places for the purpose of giving such information, if properly related to the military mission, is a valid military duty."

14 M.J. at 192 (footnote omitted). This acknowledgment is consistent with our holding, in a related context, that a traditional military inspection is a reasonable intrusion into the privacy of a military person, although if might not be tolerated in a civilian environment. *United States v. Middleton*, 10 M.J. 123 (C.M.a. 1981). The supporting rationale in each instance is that the structured discipline and accountability in the military establishment has no real counterpart in the civilian community.

"However, we are not free to ignore the decisions of the Supreme Court, but must, instead, attempt to fit them into the context of military society." *United States v. Schneider, supra* at 193. Although a military inspection may be made for health and welfare purposes, "[a]n examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in othe disciplinary proceedings is not an inspection" but a search, which must be predicated on probable cause. Mil.R.Evid. 313(b), Manual, *supra*. Likewise, without probable cause, an investigator may not detain a criminal suspect more than briefly for the purpose of interrogation.

C

Simon, however, had probable cause to apprehend the accused at this time. (1) Accompanied by men from the KINKAID, at least one of whom was black, the victim

had entered the secure compound shortly before he met his death. (2) Because the KINKAID was then the only manned ship in the SRF and there were no other berthing or messing facilities aboard the SRF, crewmembers from the KINKAID would have been the only persons inside the secure compound at the early-morning time of Smith's death. (3) The whereabouts and activities of all those assigned to the KINKAID were accounted for, and corroborated, except for Price and the accused, both of whom are black. (4) Several facts strongly suggested that Price was involved in the murder. Sunglasses found near Smith's body were similar to those reportedly worn by Price virtually night and day; Price was not wearing sunglasses during his interview despite his reported habitual wearing of sunglasses; his version of his activities when he left the ship purportedly to look for his wallet was inconsistent with the account of an eyewitness, who had seen Price leave the area of the ship headed in the direction of the crime scene; Price's story of his first meeting Smith and of their conversation on that occasion did not fit what Simon already knew of that meeting; Price's version of his activities in town on the night of the murder was implausible in light of the time and distances involved; and his story of the return to the SRF in a taxi had a number of suspicious features. (5) Price and appellant were known to be close friends. (6) Both Price and appellant placed themselves in the company of each other from the moment they left the ship on liberty until they returned to it.

Given this combination of circumstances, we agree with the Court of Military Review that, at the time of appellant's apprehension, Simon had a "reasonable belief that an offense had been committed and that the person apprehended committed it." *See* Art. 7(b); 17 M.J. at 727. Because the investigator could have apprehended appellant, Scott has no complaint that the restraint on his freedom was in some respects less than could lawfully have been imposed. Accordingly, appellant's statement was not

obtained by Special Agent Simon as the result or fruit of illegal conduct.

III

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judge COX concurs.

Judge SULLIVAN did not participate.

APPENDIX C

NMCM 81 1257.

UNITED STATES
v.

WELTON J. SCOTT, 462 92 1296, Engineman Fireman (E-3), U.S. Navy,

U.S. Navy-Marine Corps Court of Military Review.

Sentence Adjudged 30 Oct. 1980.

Decided 29 Dec. 1983.

Accused, an engineman fireman apprentice, United States Navy, was convicted by general court-martial of premeditated murder, and he appealed. The Navy-Marine Corps Court of Military Review, 13 M.J. 874, affirmed. The Court of Military Appeals reversed and remanded for further consideration. The Navy-Marine Corps Court of Military Review, Mitchell, J., held that: (1) accused was not seized, and (2) even if he was, there was ample probable cause for such seizure.

Affirmed.

LCDR William A. DeCicco, JAGC, USN, Appellate Defense Counsel.

LCDR John B. Holt, JAGC, USN Appellate Government Counsel.

Before ABERNATHY, Senior Judge, and MITCHELL and BARR JJ.

MITCHELL, Judge:

By order of the Court of Military Appeals, this Court's decision in *United States v. Scott*, 13 M.J. 874

(N.M.C.M.R.1982), was reversed and the case remanded to this court for further consideration in the light of *United States v. Schneider*, 14 M.J. 189 (C.M.A.1982). At issue is whether certain derivative incriminating evidence was erroneously considered at trial because of an alleged unlawful seizure of the appellant. *See Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *United States v. Schneider, supra.*

Based on the evidence of record including the trial briefs of counsel at the trial, we find that on 19 July 1980, the body of a sailor was found within the security perimeter of the Ship Repair Facility (SRF), U.S. Naval Station, Guam. The victim had been repeatedly stabbed and left a significant trail of blood leading from the apparent location of the stabbing to the place where he was found. The location of the body, the security procedures governing access to the SRF and the roughly approximated time of death (0330-0440) pinpointed as suspects a number of crew members from the USS KINKAID, then located at the SRF, who returned to the ship between approximately 0200 and 0300. The KINKAID was apparently the only crewed ship in the SRF at the time and was due to depart within four days. Crime scene examination and initial shipboard questioning resulted in the determinations that the whereabouts of the appellant and one STSN Price at the critical times could not be verified and that they boarded the KINKAID together at about 0300.

After completing the initial investigation at the ship and crime scene the formal questioning of witnesses began. Questioning was conducted at the NIS office spaces. Through coordination with the commands of the KINKAID and Naval Station, Guam, a vehicle and security personnel were made available to transport witnesses from the KINKAID, who had been made "available" by the command, to the NIS office spaces and back to the KINKAID. During the course of these interviews STSN Price was questioned. As a result of that interview, the NIS investigator decided

to question the appellant next in order. The NIS investigator asked the assistant station security officer, Senior Chief Waters, if he could make arrangements to have the appellant available in his office. Chief Waters told one of the detailed security persons, Heim, to bring the appellant to the NIS office for questioning. The NIS investigator did not inform either Chief Waters or Heim that the appellant was a suspect nor did he indicate that the appellant was anything other than another witness. Heim went to the KINKAID and coordinated with Gunner's Mate (Missiles) First Class (GMM-1) Ah Nee, who was on the day of the investigation assigned duty as Duty Master-at-Arms and who apparently was the point of contact for obtaining witnesses from the KINKAID. GMM-1 Ah Nee determined that the appellant was not aboard ship at the time but was at the beach. GMM-1 Ah Nee and Heim got into the shore patrol vehicle and went to the beach. Upon arrival GMM-1 Ah Nee summoned the appellant to the vehicle. He asked appellant to show his ID card and told him that he had to go to the NIS office. This latter statement is equivocal in meaning, but we assume it was directive. The appellant got into the vehicle, without manifesting dissent or an unwillingness to go, and was driven to the NIS office.

At the NIS office the appellant was taken into the waiting area and told by GMM-1 Ah Nee to have a seat. GMM-1 Ah Nee, for a time, positioned himself by the door but departed before questioning of the appellant was completed. Chief Waters informed the NIS investigator that the appellant was present. About ten minutes later the investigator came out of his office to take the appellant in for questioning. During this time three other witnesses from the KINKAID, as well as other NIS and support personnel, were in the areas, but the whereabouts of GMM-1 Ah Nee at the time the investigator met the appellant is not clear from the record. The NIS office spaces, located in the Naval Station Headquarters building, were basically

of normal administrative character. They were not graced with bars, guards or other apparent security devices or structures. The appellant was not told by anyone that he could not leave the spaces.

When questioned, the appellant was fully advised of his Uniform Code of Military Justice, Article 31, 10 U.S.C. § 831 rights, including his right to terminate the interview at any time. Had the appellant decided to terminate the interview, the NIS investigator would not have let him walk out the door unfettered but would have provided him transportation back to the ship in accordance with the previous arrangements made with the appellant's command and customary procedure. The appellant waived his pertinent rights and confidently jousted with the NIS agent over inconsistencies between his and Price's stories. The appellant denied knowing the victim, denied any involvement in the matter, but did agree to a search of his locker. On the way back to the ship the appellant was accompanied by the investigator, another agent, who was driving the vehicle, Price and another witness named Sumler, who were being returned to the ship following their interrogations. On the way, the three sailors joked about the KINKAID's food quality. The search resulted in the seizure of blood-stained levis which ultimately led to a full confession by the appellant.

This court previously and erroneously decided that the doctrine espoused in *Dunaway v. New York, supra,* and *Brown v. Illinois,* 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), was not applicable to any extent in a military setting and that no illegal seizure had taken place. *United States v. Schneider, supra,* held that *Dunaway* does apply in the military setting, but left undecided the difference in the application due because of the peculiar nature of that society. *See also, United States v. Sanford,* 12 M.J. 170 (C.M.A.1981). We need not decide the more esoteric question of the extent to which *Dunaway* may be literally applied to military cases.

At the time the NIS investigator asked to have the appellant made available for questioning, the investigator suspected him of being involved in the murder. The investigator did not communicate that suspicion to either Chief Waters or to Heim. He did not order them to apprehend appellant, but merely asked to have him transported from the ship to the NIS office. As far as Chief Waters and Heim knew, the appellant was just another witness to be interviewed, no one intended to have the appellant treated any differently than the others. When Heim found that the accused was not aboard the KINKAID he was taken by the point of contact, GMM-1 Ah Nee, to the beach. It was the command representative, GMM-1 Ah Nee, a superior of the appellant, not the shore patrolman, Heim, who summoned the appellant to the vehicle to verify appellant's identity and then order him to go to the NIS office. He invoked command, vice law enforcement, authority. The ID card was not seized. The appellant was not informed that he was a suspect or was under investigation. He was not informed that he was being apprehended nor were there other formalities normally associated with apprehension. He was not subject to restraint and he was not ordered to get into the vehicle. No rights warnings were issued at this time. No pat down, frisk or search was conducted at the time. There was no manifestation by the appellant at the time that he objected to this order or that he did not want to go to the NIS office. The appellant did, however, subordinate himself to GMM-1 Ah Nee's order. Since the appellant had not been at the ship and it was necessary to find him, there was nothing unusual about transporting him in the available vehicle nor about Heim, the driver, and GMM-1 Ah Nee accompanying the appellant in the vehicle. Such accompaniment does not create the "under guard" situation apparently present in *United States v. Schneider, supra,* but was more akin to the escort situation in *United States v. Sanford, supra,* and was generated by the practicalities of

the moment. The appellant was afoot and GMM-1 Ah Nee had a vehicle. GMM-1 Ah Nee did not hold himself out to be a policeman nor did he say that any law enforcement purpose was being served by his actions. While the appellant asserted in his trial brief that he acquiesced to the authority of GMM-1 Ah Nee, he did not claim that he considered himself to be under apprehension. Given the location of the appellant, GMM-1 Ah Nee and Heim were merely facilitating the orderly shuttling of witnesses as arranged between Naval Station, NIS and appellant's command. At NIS, appellant sat in a waiting area of normal administrative offices with at least three other witnesses. He was advised within a few minutes by the investigator that he could terminate the interview at any time and, other than assuring appellant's return to the ship, the investigator would have honored such a decision. Considering the deployed military setting in which there exists more command control and accountability of whereabouts than in civilian life, this circumstance amounts to the freedom to leave. *See generally, United States v. Hardison*, 17 M.J. 701 (N.M.C.M.R.1983). The limitations under which the appellant would have been set free at the NIS office, if he so chose, were the limitations imposed by the command and control character of military organization, the customary practice of NIS in dealing with that character, and the practical problem of securing transportation for a sailor otherwise afoot. They were not limitations imposed by policemen. In these circumstances we find that the appellant was not seized within the meaning of *Dunaway v. New York, supra. See United States v. Sanford, supra.* To hold otherwise is to render the expeditious investigation of crimes within the highly mobile sea services cumbersome, if not impossible. *See United States v. Hardison, supra.*

Assuming *arguendo* that a seizure of the person did occur in this case, we find that the NIS investigator knew the following facts concerning the case:

1. The victim was stabbed to death sometime after he and three others entered the SRF in the victim's automobile headed to the USS KINKAID at 0226 on 19 July 1980. The KINKAID was the only manned ship in the SRF at the time and there were no other berthing or messing facilities at the compound.
2. The SRF compound sentry detected the odor of marijuana emanating from the car and noticed the occupant's intoxicated behavior.
3. A crime scene search revealed a pair of sunglasses not belonging to the victim which were similar to those worn constantly by STSN Price. Price and appellant were best friends. Price met the victim the evening of 18 July 1980.
4. All of the crew members of the KINKAID who returned to the ship between 0215 and 0300 had verified whereabouts the night of the murder except STSN Price and the appellant.
5. Price and the appellant were constantly together from 2200 until they returned to the KINKAID together about 0300.
6. Price admitted that he knew the victim and that he and the appellant were in close proximity to the place of the murder about the critical time. He admitted that they smoked marijuana at the time to sober up from the night's drinking.
7. After Price boarded the KINKAID he changed clothes, put his shirt on inside out, borrowed a flashlight and left the ship to search for a lost wallet. He walked an area in the immediate vicinity of the murder.
8. Price did not have his sunglasses when interviewed by NIS, even though he was habituated to wearing them day and night.

9. The NIS agent doubted the veracity of Price for the following reasons:

a. His account of the evening's activities, distances travelled, considering mode of transportation, and travel time, was implausible.

b. Price could not recall the amount of the taxi fare he claimed he paid when he returned to the ship.

c. The circumstances in which Price supposedly lost his wallet getting out of the vehicle were implausible to the NIS agent.

d. Price's description of the taxi driver as being Guamanian did not reconcile with the investigator's street knowledge of the differences in the physical characteristics of Guamanians and persons of Oriental descent nor with the apparent Chinese or Korean surname of the taxi driver who logged into the SRF during the critical period.

e. Price's denial that, after changing clothes, he left the immediate vicinity of the corner of a pierside building midships of the KINKAID did not square with an eyewitness account of his walking to the immediate vicinity of the murder near a building aft of and inland from the KINKAID.

f. Price's claim that a friend, Sumler, witnessed the meeting of Price and the victim at 1800 on 18 July was denied by Sumler. The nature of that conversation with the victim, described by Price as hometown "chit chat," did not square with known facts regarding Price's background.

g. Price had not replaced, by the time of his interview with NIS, the sunglasses he claimed he lost two weeks earlier during a stop in New Guinea notwithstanding his being habituated to wearing them constantly, day and night.

On these facts we find ample probable cause for the NIS investigator to cause the seizure of the appellant for questioning. *See United States v. Schneider, supra.*

We find that no error materially prejudicial to the substantial rights of the appellant was committed. The findings of guilty and sentence, as approved on review below, are affirmed.

Senior Judge ABERNATHY and Judge BARR concur.

APPENDIX D

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. NO. 43967/NA
CMR Dkt. No. 81-1257

UNITED STATES,

Appellee,

v.

WELTON J. SCOTT (462-92-1296),

Appellant.

ORDER

Upon further consideration of the granted issue, 15 M.J. 64 (C.M.A. 1982), it appears that the decision of this Court in *United States v. Schneider*, 14 M.J. 189 (1982), rendered after the decision below, governs resolution of issue I raised before the Court of Military Review. Accordingly, it is, by the Court, this 27th day of September 1983.

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Military Review is reversed; the record of trial is returned to the Judge Advocate General of the Navy for submission to the Court of Military Review for further consideration in light of *United States v. Schneider*, supra.

For the Court,

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court

APPENDIX E

NMCM 81 1257.

UNITED STATES
v.

WELTON J. SCOTT, 462 92 1296, Engineman Fireman Apprentice (E-2), U.S. Navy.
U.S. Navy-Marine Corps Court of Military Review
Sentence Adjudged 30 Oct. 1980.
Decided 28 May 1982.

Accused, engineman fireman apprentice, United States Navy, was convicted by general court-martial of premeditated murder, and he appealed. The Navy-Marine Corps Court of Military Review, Kercheval, J., held that: (1) requirement of probable cause to seize individual for questioning was not applicable to military setting; (2) there was no abuse of discretion in denying request that investigative agent, who had been designated by trial counsel as a representative of the United States, thus preventing his exclusion from courtroom during testimony of other witnesses, be compelled to testify before other prosecution witnesses; and (3) accused was entitled to administrative credit of 27 days against his sentence to confinement.

Findings and sentence approved on review below affirmed.

LCDR Stephen C. Baker, JAGC, USN, Appellate Defense Counsel.

LCDR Michael R. McGuire, JAGC, USN, Appellate Government Counsel.

Before BAUM, Senior Judge, and ABERNATHY and KERCHEVAL, JJ.

KERCHEVAL, Judge:

Appellant, contrary to his pleas, was convicted of premeditated murder, in violation of Article 118, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 918, at a general court-martial before members. He was sentenced to confinement at hard labor for the remainder of his natural life, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the findings and sentence as adjudged.

Appellant asserts seven assignments of error before this Court. We agree with Assignment of Error VII, but reject the other assignments. The first two assignments, however, also warrant discussion.

I. THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS TWO PRETRIAL STATEMENTS MADE BY APPELLANT AND PHYSICAL EVIDENCE OBTAINED AS A RESULT OF A SEARCH OF APPELLANT'S LOCKER. *SEE DUNAWAY v. NEW YORK*, 442 U.S. 200, 99 S.CT. 2248, 60 L.ED.2D 824 (1979) AND *UNITED STATES v. ESCOBEDO*, 11 M.J. 51 (CMA 1981).

On 19 July 1980 the body of a murder victim was discovered on board Ship Repair Facility, U. S. Naval Station, Guam. Appellant became a prime suspect in the Naval Investigative Service's (NIS) investigation of the crime, prompting Special Agent Simon's decision to have appellant brought in to his office for questioning. Appellant was located at the military beach by security officers and transported to the NIS office at about 1500 that afternoon. He was given Article 31(b), UCMJ, warnings and counsel rights, acknowledged and waived the rights and was informed that he was suspected of murder. Appellant would have been physically restrained had he attempted to leave the interview room by any means other than transportation back to his ship provided by the agent. Appellant subsequently consented to a search of his locker, which

yielded a pair of pants containing stains later identified as blood. Special Agent Simon then interviewed appellant a second time in which, after appellant was again warned of his rights, he confessed to committing the murder. Appellant "readily" agreed to return to the scene of the murder and reenacted how he killed the victim.

Appellant, relying on *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), and *United States v. Escobedo*, 11 M.J. 51 (C.M.A.1981), asserts that his initial detention violated the Fourth Amendment because he was seized without probable cause. He further contends that, because of the alleged violation, the statements made during the interview, the evidence seized pursuant to the search of his locker, and his subsequent confession should not have been admitted at trial.

The Supreme Court in *Dunaway v. New York, supra*, held that the Fourth Amendment requires police to have probable cause to believe that an individual has committed an offense before he can be brought in for custodial interrogation. It is clear from the record of trial that appellant was subjected to custodial interrogation, but we need not decide whether the NIS had probable cause in light of the conclusions we have reached concerning *Dunaway v. New York, supra*, and *United States v. Escobedo, supra*.

While the reasonable requirement of the Fourth Amendment generally mandates that a seizure be based upon probable cause, *e.g., Dunaway v. New York, supra; Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), certain seizures are permissible on a lesser standard, *see, e.g., Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981);[1] *Terry v. Ohio*,

[1] The Supreme Court in *Michigan v. Summers, supra*, indicated that, even in light of *Dunaway v. New York, supra*, certain less intrusive seizures of suspects are permitted by civilian law enforcement authorities.

392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). It is also apparent to this Court that the ordering of a servicemember to report to military investigative authorities for questioning about a serious offense that has been committed within a military enclave should be subjected to less rigorous requirements than those imposed on the civilian community in general. It has been "long recognized that the military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439 (1974). *See also Brown v. Glines*, 444 U.S. 348, 354, 100 S.Ct. 594, 599, 62 L.Ed.2d 540 (1980); *United States v. Middleton*, 10 M.J. 123, 127 (C.M.A.1981). Furthermore, "it is forseeable that reasonable expectations of privacy within the military society [as provided by the Fourth Amendment] will differ from those in the civilian society." *United States v. Middleton, supra* at 127; *see also Parker v. Levy, supra*, 417 U.S. at 751, 94 S.Ct. at 2559.

The detention of appellant was one of those situations where the specialized needs of the military should permit a seizure on less than probable cause. A brutal murder was committed on base and it was imperative that the investigation and solution of the offense be accomplished as soon as possible in order to maintain order, effectiveness, and discipline at the command. Persons in the military realize that they are subjected to orders which members of the civilian community are not. As stated by the Court of Military Appeals:

> It is true that military personnel have legal and personal rights not subject to military orders, and that orders which are arbitrary and unreasonable, or too broad and uncertain, cannot be approved. See *United States v. Milldebrandt*, 8 USCMA 635, 25 CMR 139; *United States v. Wysong*, 9 USCMA 249, 29 CMR 29; *United States v. Nation*, 9 USCMA 724, 26 CMR 504; *United States v. Wilson*, 12 USCMA 165, 30 CMR

> 165; *United States v. Wheeler*, 12 USCMA 387, 30 CMR 387; *United States v. Aycock*, 15 USCMA 158, 35 CMR 130. However, it is also to be remembered, as a unanimous Court pointed out as early as *United States v. Martin*, 1 USCMA 674, 676, 5 CMR 102:
>
> "... All activities which are reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and are directly connected with the maintenance of good order in the services are subject to the control of the officers upon whom the responsibility of the command rests. ..."
>
> *United States v. Giordano*, 15 U.S.C.M.A. 163, 166-67, 35 C.M.R. 135, 138-39 (1964).

For these reasons we find that the requirement for probable cause to seize an individual for questioning as enunciated in *Dunaway v. New York, supra*, is not applicable to the military setting. In this regard we note that the Court of Military Appeals in *United States v. Escobedo, supra*, did not address the question of whether *Dunaway* applies to military authorities who have seized or detained a service member for custodial questioning by a means short of apprehension. *Escobedo* involved a situation where an accused was illegally *apprehended* without probable cause. The Court in that case drew from the analysis used in *Dunaway* to determine whether the accused's subsequent confession was sufficiently attenuated of the taint caused by the illegal apprehension. *Dunaway* was not utilized as the basis for finding the apprehension to be unlawful. *See United States v. Escobedo, supra* at 55.

Appellant was therefore lawfully seized for purposes of questioning about a suspected offense and the contested evidence flowing from that questioning was probably admitted at his court-martial. He was also properly afforded Article 31(b), UCMJ, warnings and counsel rights, which

he waived, and was not formally apprehended until after the NIS clearly had probable cause to believe that he committed the murder. Accordingly, appellant's first assignment of error is rejected.

II. THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S REQUEST TO COMPEL AGENT SIMON TO TESTIFY BEFORE OTHER PROSECUTION WITNESSES. *SEE* RULE 615, MILITARY RULES OF EVIDENCE.

Mil.R.Evid. 615 states as follows:

> At the request of the prosecution or defense the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the order sua sponte. This rule does not authorize exclusion of (1) the accused, or (2) a member of an armed service or an employee of the United States designated as representative of the United States by the trial counsel, or (3) a person whose presence is shown by a party to be essential to the prosecution of the party's case.

In short, the rule authorizes the military judge to exclude a witness from the courtroom during the testimony of other witnesses unless that witness is included within one of the three exceptions enumerated by the rule.

Pursuant to Mil.R.Evid. 615(2), trial counsel designated Special Agent Simon as a representative of the United States, which prevented his exclusion from the courtroom during the testimony of other witnesses called to testify in the case. Special Agent Simon was the fifth witness called by the prosecution, enabling him to hear the testimony of four other witnesses before he testified.

Mil.R.Evid. 615 is taken from Fed.R.Evid. 615[2] with only minor changes in terminology. *See* Analysis of the

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[2] Fed.R.Evid. 615 provides:

Military Rules of Evidence, Rule 615, Appendix 18, *Manual for Courts-Martial, 1969 (Rev.)*. (Drafter's Analysis). We, therefore, find the interpretation by the courts of the federal version of the rule instructive in our interpretation of the military version, and find the interpretation by those courts correct and equally applicable to the military rule.

Investigative agents, such as Special Agent Simon, are clearly within that group of persons who may be designated as a representative of the United States, even though they will be called as a witness. *United States v. Holmes*, 594 F.2d 1167 (8th Cir. 1979); *In re United States*, 584 F.2d 666 (5th Cir. 1978). Appellant, however, challenges the denial by the military judge of appellant's request to compel Special Agent simon to testify before he heard the testimony of other witnesses. While the analysis to Mil.R.Evid. 615 recognizes the development of a defense right, upon request, to have the Government's representative testify before the other witnesses, *see* Drafter's Analysis, *supra*, it is discretionary with the trial judge as to whether he will require the representative to testify before the other witnesses. *United States v. Alvarado*, 647 F.2d 537 (5th Cir. 1981). In the instant case there was clearly no abuse of discretion by the military judge, for appellant was in no way prejudiced by Special Agent Simon hearing the testimony of those witnesses called before him, especially since the agent's testimony was not offered to corroborate the testimony of the prior witnesses, and not of a nature that he could have formulated any part of his testimony based on that of any of those witnesses. We, therefore, reject this assignment of error.

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

VII. THE CONVENING AUTHORITY ERRED IN APPROVING THE ENTIRE ADJUDGED SENTENCE WHERE THE MILITARY JUDGE HAD ORDERED ADMINISTRATIVE CREDIT BE GIVEN FOR 27 DAYS OF PRETRIAL CONFINEMENT (R. 501). *SEE UNITED STATES v. LARNER*, 1 M.J. 371 (CMA 1976).

The 27 days of administrative credit ordered by the military judge was proper. *See* Article 13, UCMJ, 10 U.S.C. § 813; paragraph 125, MCM. We, therefore, order that appellant be given an administrative credit of 27 days against his sentence to confinement. *See, e.g., United States v. Larner*, 1 M.J. 371 (C.M.A. 1976).

Accordingly, the findings and sentence as approved on review before are affirmed.

Senior Judge BAUM and Judge ABERNATHY concur.

Supreme Court, U.S.
FILED
FEB 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1040

In the Supreme Court of the United States

OCTOBER TERM, 1986

WELTON J. SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether there was probable cause to apprehend petitioner under Article 7(b) of the Uniform Code of Military Justice, 10 U.S.C. 807(b), for the murder of a fellow servicemember.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 2a-17a) is reported at 22 M.J. 297. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 18a-26a) is reported at 17 M.J. 724.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 18, 1986, and a petition for rehearing was denied on October 29, 1986. The petition for a writ of certiorari was filed on December 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Following a general court-martial, petitioner was convicted of premeditated murder, in violation of Article 118 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918. Petitioner was sentenced to life imprisonment, a dishonorable discharge, forfeiture of all pay and

allowances, and reduction in rank to the lowest enlisted pay grade. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence (Pet. App. 28a-35a). On petitioner's appeal to the Court of Military Appeals, that court remanded the case to the court of military review for reconsideration in light of a recent Court of Military Appeals' decision (Pet. App. 27a). On remand, the court of military review again affirmed the findings and sentence (Pet. App. 18a-26a). When petitioner again appealed to the Court of Military Appeals, that court affirmed the findings and sentence (Pet. App. 2a-17a).[1]

1. This case concerns the stabbing murder of Yeoman Second Class Gary Smith during the early morning hours of July 19, 1980. At 2:26 a.m., Smith, who worked at the Naval Legal Service Office in Guam, approached the gate to the ship repair facility, a secure compound at the Guam Naval Station. Smith told the guard that he needed to return his passengers to their ship, the *USS Kinkaid*, which was docked at the ship repair facility on a brief port call. The guard noticed that there were two or three other men in the car, at least one of whom was black. He also detected the odor of marijuana in the car (Pet. App. 4a; Tr. 15-17). About three hours later, the guard discovered Smith's body at a distant part of the compound.[2] Smith had suffered numerous stab wounds to the neck, chest,

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[1] Petitioner's confederate, Gregory Price, was convicted of murder at a separate trial. *United States* v. *Price*, 15 M.J. 628 (N.M.C.M.R. 1982), petition denied, 16 M.J. 156 (C.M.A. 1983).

[2] Blood stains formed a trail approximately 100 yards long from a nearby building to the body. Smith's car was nearby. In it were two pairs of sunglasses, a "coke" spoon, and a substance that the investigator believed was marijuana. A pair of sunglasses (later identified as Smith's) was found near the place where Smith was originally

and back. A duty physician, relying on the temperature of Smith's body, estimated that his death occurred between 3:30 a.m. and 4:40 a.m.

Naval Investigative Service Special Agent Ernest Simon was contacted, and he immediately began to investigate Smith's death. His investigation focused on the crew of the *Kinkaid* because of Smith's remarks to the guard and because there were no other living or eating facilities at the ship repair facility. From interviewing the *Kinkaid's* crewmembers and examining its log, Agent Simon learned that 10 to 20 crewmembers had returned to the ship between 2:26 and 3:30 a.m. (Tr. 17-18, 74). Most of the black crewmembers returned together aboard a bus. Petitioner and another black sailor, Gregory Price, however, returned together at 3 a.m. after the main group had arrived (Pet. App. 5a; Tr. 17-30).[3] Agent Simon also learned that, after returning to the ship, Price had hurriedly changed clothes, borrowed a flashlight, ostensibly to look for his lost wallet, and then walked out of sight of the ship in the direction of the crime scene. Agent Simon knew that Price habitually wore sunglasses day and night, and Agent Simon believed that a pair of sunglasses found at the scene may have belonged to Price. Finally, Agent Simon learned that Price and petitioner were close friends (Pet. App. 5a; Tr. 23-26).

Agent Simon interviewed Price later that day. During the interview, Price stated that he and petitioner were constantly together from 10 p.m. the previous night until they returned to the ship by taxi after spending the evening in the nearby downtown area. According to Price, he and

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stabbed, and another pair (later identified as belonging to petitioner's confederate Gregory Price) was found along the trail of blood (Pet. App. 4a; Tr. 17-22).

[3] A taxi with passengers passed through the gate of the ship repair facility at about that time (Tr. 17-30).

petitioner did not immediately board the *Kinkaid* because they were intoxicated and the ship's rules forbade returning in that condition. To sober up, he said, they smoked some marijuana. Price maintained that he did not see petitioner after going aboard the *Kinkaid*. He denied ever having left sight of the ship when he went to look for his wallet, and he denied going in the direction of the crime scene. Price also said that he had lost his sunglasses two weeks before. Agent Simon concluded that Price had lied to him about several matters during the interview (Pet. App. 5a-8a; Tr. 25-30, 74).[4]

After interviewing Price, Agent Simon decided to speak with petitioner, because Agent Simon suspected that petitioner and Price were involved in Smith's murder. At that point, Agent Simon knew that petitioner and Price were the only two black members of the *Kinkaid* who did not have witnesses to account for their whereabouts during the relevant period (Tr. 27). To speak with petitioner, Agent Simon followed the procedure that had been coordinated with the commands of the *Kinkaid* and the Naval Station and that had been followed with regard to other witnesses from the ship. A shore patrolman went to the *Kinkaid*, where he was told by the duty master-at-arms that petitioner was on the naval station beach. After finding petitioner, the ship's duty master-at-arms summoned petitioner to his vehicle, checked petitioner's identification

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[4] For instance, Price could not explain how he lost his wallet, and his account of his and petitioner's whereabouts the night before was inconsistent with Agent Simon's estimate of the time that it would take to travel between the places that Price described. Price's account of his relationship with Smith conflicted with what Agent Simon had learned from another crewmember. Price also stated that he and petitioner returned that evening by taxi driven by a native Guamanian, but the log at the facility gate indicated that the driver appeared to be Chinese or Korean (Pet. App. 7a; Tr. 27-29).

card, and told him that he had to go to the Naval Investigative Service office. Petitioner accompanied the duty master-at-arms and the shore patrolman without complaint during the three-to-five minute drive to the office (Pet. App. 8a).

Petitioner sat in the waiting room for about ten minutes before Agent Simon escorted him into an interrogation room. Agent Simon advised petitioner of his *Miranda* rights and his right to terminate the interview at any time, and petitioner waived those rights in writing. Agent Simon advised petitioner that he was a suspect, but petitioner did not ask to speak with a lawyer, to stop the interview, or to leave, and he readily responded to Agent Simon's inquiries. At the end of the interview, petitioner consented in writing to a search of his shipboard locker (Tr. 44, AX 2).[5] Petitioner and Agent Simon, along with another agent who drove, left for the *Kinkaid* along with Price and a friend of theirs, both of whom were returning to the ship after their questioning. At the *Kinkaid*, petitioner identified the clothing he wore the night before. Agent Simon noticed what appeared to be blood stains on petitioner's jeans, and he seized the jeans for a laboratory analysis. After leaving petitioner with the *Kinkaid's* executive officer, Agent Simon returned to his office. Later that day, a laboratory analysis confirmed Agent Simon's suspicions, and he questioned petitioner again. This time, petitioner admitted that he had murdered Smith (Pet. App. 9a-10a; Tr. 46-57).

2. At a pretrial hearing, petitioner moved to suppress his statements and the trousers seized from his shipboard locker, on the ground that petitioner was apprehended

---

[5] Before obtaining petitioner's consent, Agent Simon advised petitioner that he had the right to refuse consent, that he would suffer no penalty for refusing to give his consent, and that any incriminating evidence found during the search could be used against him (Tr. 43).

without probable cause at the time that Agent Simon first questioned him (Tr. 11; see AX 8-9). After an evidentiary hearing, the trial judge denied the motion (Tr. 91-92). He concluded that petitioner had been apprehended without probable cause, but he found that petitioner's statements were not tainted by the seizure (*ibid.*).[6]

3. The court of military review affirmed (Pet. App. 35a). The court did not decide whether Agent Simon had probable cause to apprehend petitioner (*id.* at 30a). Instead, it concluded that a serviceman can be ordered to report to military investigative authorities for questioning about a serious offense committed within a military enclave even when the authorities do not have probable

---

[6] The trial judge explained his ruling as follows (Tr. 91-92):

> First; the * * * confession was voluntarily given. Second; I considered the accused's age, experience and demeanor during the time in question. Three; the accused was advised of his right to terminate the interview at any time as well as his counsel and Article 31 rights. Four; the accused was not placed in handcuffs nor was he harassed or intimidated. Five; the accused was not physically restrained or humiliated in any manner. Six; while the accused's detention had a quality of purposefulness[,] the manner in which the detention was effectuated was not calculated to cause surprise, fright or confusion. Seven; after * * * denying culpability the accused was released from NIS custod[y] and returned to his command. Eight; the accused freely and voluntarily consented to a search of his lockers on board ship. Nine; the discovery of human blood on the pants seized from the accused['s] locker together with all other information known by NIS provided probable cause to apprehend the accused. Ten; the confession was given after probable cause developed. Eleven; the accused's release from NIS custody, the permissive search and the discovery of human blood on the accused's pants were intervening events of significance. Twelve; while the accused was not free to go during the initial detention, that status came about solely because NIS intended to return him to his command at the conclusion of the interview. Thirteenth; [the] NIS Agents acted in good faith.

cause to believe that the serviceman has committed a crime (Pet. App. 31a-32a). The Court of Military Appeals vacated the judgment of the court of military review and remanded the case to that court for reconsideration in light of *United States* v. *Schneider*, 14 M.J. 189 (C.M.A. 1982), which held that *Dunaway* v. *New York*, 442 U.S. 200 (1979), applies to the military (Pet. App. 27a). On remand, the court of military review determined that petitioner had not been seized when he consented to the search of his locker (*id.* at 19a-23a). The court also concluded that, in any event, there was probable cause to apprehend petitioner at the time he spoke with Agent Simon (*id.* at 23a-26a).

4. The Court of Military Appeals affirmed (Pet. App. 2a-17a). Relying on *Dunaway* v. *New York, supra*, it concluded that petitioner had been apprehended at the time he first spoke with Agent Simon (Pet. App. 11a-15a). The court determined, however, that Agent Simon had probable cause to seize petitioner at that point, given the "combination of circumstances" in this case (*id.* at 16a). Accordingly, the court found that the petitioner's statements and his consent to the search of his locker were not the fruits of illegal conduct by Agent Simon (*id.* at 16a-17a).

ARGUMENT

Petitioner does not challenge the trial court's ruling that Agent Simon had probable cause to arrest him for Smith's murder once the agent discovered blood stains on his trousers. Rather, petitioner argues that he was arrested without probable cause when he was first taken to the Naval Investigative Service Office by Agent Simon. The conclusion that Agent Simon had probable cause at that point does not warrant review by this Court.

Probable cause cannot be based solely on a person's presence in the company of others believed to be involved in criminal activities. *United States* v. *Di Re*, 332 U.S. 581

(1948). But when presence is coupled with other incriminating evidence, it may justify the inference that a person is involved with others in criminal activities. See *United States* v. *Howard*, 758 F.2d 1318, 1319-1320 (9th Cir. 1985); *United States* v. *Clark*, 754 F.2d 789, 791 (8th Cir. 1985); *United States* v. *Fisher*, 702 F.2d 372, 376 (2d Cir. 1983); *United States* v. *Capers*, 685 F.2d 249, 251-252 (8th Cir. 1982); *United States* v. *Irurzun*, 631 F.2d 60, 62-63 (5th Cir. 1980); 1 W. LaFave, *Search & Seizure* § 3.6, at 659-661 (1978).

Petitioner contends the Court of Military Appeals relied on nothing more than his mere presence in Price's company on their return to the ship to justify his arrest. The court's opinion makes clear (Pet. App. 15a-16a), however, that it relied on several factors. At the time he first sought to question petitioner, Agent Simon knew that Smith had been murdered during the early morning hours at a remote, unoccupied area of the ship repair facility. He also had reason to believe that Smith's murderer was a member of the *Kinkaid* crew, that two or three crewmembers, at least one of whom was black, were passengers in Smith's car when he entered the ship repair facility, and that every black sailor except petitioner and Price had an alibi for the relevant period. Agent Simon had probable cause to believe that Price was involved in Smith's murder, and the nature of the crime suggested that it may well have been committed by more than one person.[7]

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[7] That last fact distinguishes this case from *Wong Sun* v. *United States*, 371 U.S. 471 (1963) (one person identified as heroin distributor), and *Mallory* v. *United States*, 354 U.S. 449 (1957) (rape by one assailant). In those cases, the police knew that only one person was responsible. By contrast, the multiple wounds to Smith's body and the violent nature of the assault suggested that Smith had been overpowered – which supported the inference that more than one person participated in the attack. Agent Simon therefore reasonably focused his suspicion upon both of the two remaining *Kinkaid* crewman who fit the description of a person with whom Smith was

The decision below does not, as petitioner argues (Pet. 7), conflict with this Court's decision in *United States* v. *Di Re, supra.*[8] Di Re was one of four people in a car when an informant told an undercover investigator that the driver had given the informant coupons that the investigator

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last seen before he was stabbed. Petitioner's fear (Pet. 7 n.1, 10-11 & n.4) that the decision below authorizes dragnet seizures of servicemen is therefore unfounded.

[8] *Sibron* v. *New York*, 392 U.S. 40 (1968), and *Ybarra* v. *Illinois*, 444 U.S. 85 (1979), are also distinguishable. In *Sibron*, the defendant spoke with narcotics addicts over a period of hours; there was no visible criminal activity, and the officer did not know what the conversations were about. 392 U.S. at 62. In *Ybarra*, the defendant was present in a public tavern at a time when the police had probable cause to believe that the bartender possessed heroin; there was no reason to believe that the defendant was involved in or knew of any criminal activity. 444 U.S. at 90-91.

Petitioner also relies (Pet. 7) on several federal courts of appeals decisions, but the distinction between those cases and the decision below stems from differences in fact, not principle. In *United States* v. *Vaughan*, 718 F.2d 332 (9th Cir. 1983), the police had arrest warrants for two persons in the car in which the defendant was a passenger, but the police had no reason to suspect that the defendant was involved in or aware of any criminal activity (*id.* at 334). In *United States* v. *Fisher, supra*, the court found that the evidence would have justified the arrest of "virtually any Black male who, at lunchtime in a predominantly Black neighborhood, happened to come through a back-yard" on a particular local street, even if he was walking home (702 F.2d at 379). In *United States* v. *Bazinet*, 462 F.2d 982 (8th Cir.), cert. denied, 409 U.S. 1010 (1972), the police had probable cause to believe that a passenger in the car driven by Bazinet had stolen dynamite and that the dynamite was in a bag in the car in the passenger's possession. The court found that the police lacked probable cause to arrest Bazinet because no obviously criminal activity had occurred in his presence, the bag was not in his possession or control, and the meeting was not secretive or suspicious, but took place in broad daylight on a public street (*id.* at 989). Finally, in *United States* v. *Capers, supra*, the court found that the circumstances established probable cause for the arrest.

knew to be counterfeit. 332 U.S. at 583. This Court found that the investigator did not have probable cause to arrest Di Re for conspiracy to distribute counterfeit coupons. There was no evidence that Di Re was in the car when the coupons were passed to the driver or that he took part in any related conversation. Even if Di Re was present, there was no reason to infer that Di Re would have known that the coupons were counterfeit. *Id.* at 593. The circumstances of Di Re's presence also did not suggest that he was a participant in a crime: the "meeting [was] not secretive or in a suspicious hideout but in broad daylight, in plain sight of passers-by, in a public street of a large city" (*ibid.*). By contrast, Agent Simon had reason to believe that petitioner was present with another suspect during the early morning hours at a remote location of a military base when an extremely violent crime occurred. When these factors are considered as a whole, Agent Simon could reasonably have believed that petitioner was involved in some way in the crime.[9]

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[9] Even if Agent Simon did not have probable cause to believe that petitioner had committed the crime, he had at least a well-founded, reasonable suspicion that petitioner was involved, as well as probable cause to believe that petitioner knew about the events in question. In analyzing the reasonableness of the agent's actions, the differences between the military and the civilian communities must be considered. See *United States* v. *Sanford*, 12 M.J. 170, 173-174 (C.M.A. 1981) ("A service member is simply not free to ignore the lawful commands of his superiors [to report to a specified location]."). Petitioner could have been detained at the beach for questioning, and the additional intrusion of requiring him to go to the Naval Investigative Service Office for questioning was minimal. Because petitioner consented to the interview once he arrived at the NIS office, the brief period of his involuntary detention did not approach the level of intrusiveness that was involved in *Dunaway* v. *New York, supra*. Accordingly, even if Agent Simon did not have probable cause to arrest petitioner until after he discovered petitioner's blood-stained pants, the brief detention of petitioner for purposes of transporting him to the NIS office

Petitioner argues (Pet. 8, 11-12) that Agent Simon lacked a reasonable basis to believe that petitioner committed the murder, since petitioner had already returned to the ship prior to the time that Smith's death was estimated to have occurred.[10] But Smith had suffered numerous stab wounds and was found lying at the end of a trail of blood indicating that he had moved a considerable distance after being stabbed. Thus, it was reasonable for Agent Simon to believe that Smith's death was not instantaneous. The relevant inquiry, therefore, is whether petitioner was present when Smith was stabbed, not when he died. Moreover, the doctor's estimate that Smith died between 3:30 and 4:40 a.m. was based upon Smith's body temperature (not an autopsy) on a summer night in the tropics of Guam. In light of the other evidence known by Agent Simon, it was reasonable for him to infer (Tr. 17) that the estimate was not exact and to question the black sailors who may have been with Smith between 2:26 a.m., the time he was last seen alive, and 3 a.m., when the last black crewmembers returned to the *Kinkaid*.[11]

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was still reasonable under the rationale of *Terry* v. *Ohio*, 392 U.S. 1 (1968), and *United States* v. *Sharpe*, 470 U.S. 675 (1985).

[10] Petitioner also argues (Pet. 10) that Price's suspicious behavior in leaving the *Kinkaid* after 3 a.m. ostensibly to look for his wallet suggested that Price alone was responsible for the murder. Price's actions did not exculpate petitioner, however, and given the improbable alibi offered by Price for both petitioner and himself, Price's actions increased the suspicion as to both. The question is not whether it was more likely that Price was guilty of the murder than petitioner, but whether, under all of the circumstances, there was "fair probability" that petitioner was involved. See *Illinois* v. *Gates*, 462 U.S. 213, 231-232 (1983); see also *United States* v. *Fixen*, 780 F.2d 1434, 1436-1439 (9th Cir. 1986) (applying *Gates* to a warrantless arrest).

[11] In any event, the factors identified in *Rawlings* v. *Kentucky*, 448 U.S. 98, 107-110 (1980); *Dunaway* v. *New York*, 442 U.S. at 218; and *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975), show that the trial court correctly found (Tr. 91-92) that petitioner's consent and his

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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later admissions were not tainted, even if he was unlawfully seized when first questioned by Agent Simon. First, petitioner was advised of his *Miranda* and Article 31(b) (10 U.S.C. 831(b)) rights at the outset of his initial interview, and he was told that he had the unqualified right to refuse consent to a search. Second, there were intervening circumstances between the initial interview, the search, and petitioner's later confessions. The search was completed at 5:25 p.m., and petitioner was not restrained by Agent Simon until the agent interviewed him and he confessed at 10:33 p.m. (Tr. 47; AX 3). Third, there was no deliberate or flagrant police misconduct. The trial court found (Tr. 91-92) that Agent Simon at all times acted in good faith; he followed NIS policy, which authorized the procedures used here (Tr. 59-61). See *Rawlings* v. *Kentucky*, 448 U.S. at 110; compare *Brown* v. *Illinois*, 422 U.S. at 605.

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